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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1310

SAM DEAN,
PETITIONER

—VS—

THE GADSDEN TIMES PUBLISHING CORPORATION, a corporation,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals of Alabama entered in the above case on August 23, 1972.

OPINIONS BELOW

The opinion of the Court of Civil Appeals of Alabama is reported at 268 So. 2d 829, and a copy of that opinion is attached hereto as Appendix A. The Supreme Court of Alabama denied certiorari to review that judgment on October 19, 1972, and denied a petition for rehearing on No-

vember 30, 1972, and that memorandum opinion is reported at 268 So. 2d 834, and a copy is attached hereto as Appendix B.

JURISDICTION

The Supreme Court of Alabama denied a rehearing to review the judgment and opinion of the Court of Civil Appeals of Alabama on November 30, 1972. On the 1st day of March, 1973, this court through Justice Powell, granted an extension of time within which to file a Petition for Writ of Certiorari, up to and including March 28, 1973. The jurisdiction of this court is invoked under 28 USC 1257(3).

THE QUESTION PRESENTED

Does Title 30, Section 7(1), of the Code of Alabama, which requires employers to pay an employee during his absence from work while summoned as a juror, his usual compensation for such employment less the compensation the employee receives as a juror, violate the Fourteenth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISION

The constitutional provision involved is in Section One of the Fourteenth Amendment to the United States Constitution, which provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

The statute involved is contained in Title 30, Section 7(1), Code of Alabama 1940, which reads as follows:

> EMPLOYEE SERVING AS JUROR ENTITLED TO USUAL COMPENSATION LESS JUROR'S FEE. — Upon receiving a summons to report for jury duty, any employee shall on the next day he is engaged in his employment exhibit the summons to his immediate superior and the employee shall thereupon be excused from his employment for the day or days required of him in serving as a juror in any court created by the constitutions of the United States or the State of Alabama or the laws of the United States or the State of Alabama. Notwithstanding the excused absence as herein provided, any full-time employee shall be entitled to his usual compensation received from such employment less the fee or compensation he received for serving as such juror. It shall be the duty of all persons paying jurors their fee or compensation for services to issue to each juror a statement showing the daily fee or compensation and the total fee or compensation received by the juror."

STATEMENT

This case arose as a result of an action by the petitioner, an employee, against the respondent, his employer, to recover compensation lost by the employee as a result of being required to serve as a juror. The action was brought pursuant to Title 30, Section 7(1), Code of Alabama, which

requires all Alabama employers to pay their employees their usual compensation for time off when the employee is absent from work due to serving on a jury, less the compensation the employee receives as a juror. The constitutionality of the statute was first raised in the trial court by a pleading that it was in violation of the United States Constitution and denied the respondent due process of law. The pleading, a demurrer, was overruled and the respondent excepted. This appears at pages 3 and 4 of the record below. On appeal to the Court of Civil Appeals of Alabama, the constitutional question was again raised by an assignment of error, which the court below considered well taken. The assignment is number one, and is on page 18 of the record below. The case was submitted to the trial court on an agreed statement of facts. No oral testimony was taken. The statement of facts was as follows:

"(1) That the plaintiff was employed by the defendant during the week of November 3, 1969.

"(2) That during the week of November 3, 1969, the plaintiff was subpoenaed for jury duty for said week, and, in fact, did serve on, to-wit: November 3, 4, and 5, 1969.

"(3) That the plaintiff was paid for said jury duty by the Circuit Clerk of Etowah County, Alabama.

"(4) That the plaintiff made demand upon the defendant for payment to him of $63.00, which said sum represented the difference in his jury pay and his regular wages, pursuant to Act Number 619 of the Legislature of Alabama 1969.

"(5) That the defendant refused to pay the plaintiff and has continually refused to pay the plaintiff since said date."

The trial court rendered a verdict for the petitioner for the amount sued for. The case was appealed to the Court of Civil Appeals of Alabama, an intermediate appellate court, which reversed the trial court on August 23, 1972, holding the Alabama statute unconstitutional. The court held that it constituted a taking of private property without compensation, which would not be justified under the state's police power or its power to tax. The court stated that, in the absence of special benefits to employers, the state had no basis for enacting the legislation. A petition for rehearing was timely filed and denied on September 20, 1972. Review of this judgment was sought from the Supreme Court of Alabama, but a petition for a writ of certiorari was denied on October 19, 1972. A petition for rehearing was timely filed and denied on November 30, 1972. The Supreme Court of Alabama made no determination of the merits of the statute in declining to review the opinion of the Court of Civil Appeals.

The petitioner sought an extension of time within which to file this petition for writ of certiorari and this Court extended the time for filing to March 28, 1973.

REASONS FOR GRANTING THE WRIT

The decision below demands review by this Court because it involves a substantial constitutional question in the interpretation of the Fourteenth Amendment to the United States Constitution. It is in conflict with previous decision of this Court in *Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421, 72 S.Ct. 405, and followed the case of *Coppage v. Kansas*, 236 U.S. 1, 34 S.Ct. 240, a case long since discarded by this Court.

The decision below is a flagrant disregard of the principles and propositions of this Court. The result of the decision of the Alabama Court is to resurrect the infamous legal principles followed at the turn of this century to hold invalid useful and constructive social legislation. To adopt the ruling of the court below would void the basis upon which rests programs such as Social Security, Workmens' Compensation and Unemployment Insurance. It represents a position so long forsaken as to defy explanation of its adoption in the Twentieth Century. Its logic is reminiscent of many cases involving social legislation of the late Nineteenth Century. It cannot, under any interpretation be justified under modern principles established by this Court that courts do not sit as "super-legislatures" to review actions of elected legislative bodies.

In its decision, the Alabama court relied upon the case of *Coppage v. Kansas*, 236 U.S. 1, 34 S.Ct. 240, for the proposition that a statute, unless it has an express or implied objective in promoting the welfare of the general public, *other* than leveling inequalities of fortune, is an unconstitutional interference with rights guaranteed under the Fourteenth Amendment. In other words, its expressed or implied purpose must be to advance public welfare beyond the mere leveling of inequalities of fortune or it is unconstitutional. The court further determined that the only apparent intent of the statute was that an employee not suffer economic loss while serving as a juror, which would merely be leveling inequalities of fortune between employers and employees by compelling the former to compensate employee-jurors, rather than placing the burden on the general public. Thus, since the implied purpose was to level inequalities of fortune, the statute was an unconstitutional interference with the rights of employers guaranteed under the Fourteenth Amendment,

and thus invalid under the reasoning of the *Coppage* case. This appears to be the legal logic applied by the court. The rationale of the *Coppage* case, is not followed today. As was stated by Mr. Justice Black in *Ferguson v. Skrupa*, 83 S.Ct. 1028 (1963), at page 1031:

> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases — that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely — *has long since been discarded.*"[1] (Emphasis added.)

The *Coppage* case, relied upon heavily by the court below, does not represent the modern viewpoint. The courts of this country, led by the decisions of this court, have returned to the original proposition that courts do not substitute their social and economic opinions for those of the legislatures, and do not sit as "super-legislatures" to weigh the wisdom of legislation. *Day-Brite Lighting, Inc. v. Missouri*, supra. This trend was expressed by Mr. Justice Stewart in *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153 (1970), at page 1161, as follows:

> "For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S.

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[1] **Lochner v. New York**, 198 U.S. 45, 25 S.Ct. 539.
Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240.
Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394.
Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412.

483, 488, 75 S.Ct. 461, 464, 99 L.Ed. 563. That era long ago passed into history. *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed. 2d 93."

The *Dandridge* case involved a regulation of the Maryland Department of Public Welfare placing a maximum limit of monthly benefits payable under AFDC (Federal Aid to Families with Dependent Children), regardless of size of the family and its actual need as computed under the program's standards. The need of each family was computed by reference to the size of the family and its particular circumstances. The need of small families, when computed, would be within the maximum limits, but the need of large families, when computed, would substantially exceed the maximum amount payable. The regulation was upheld against the argument that it discriminated against large families in violation of the Equal Protection Clause of the Fourteenth Amendment. The court held that a state regulation, in economic or social matters, is not unconstitutional because it results in some inequality, as long as the state has a legitimate interest in the matter at hand. The State of Maryland had such an interest in encouraging employment and preventing discrimination between welfare families and families of the working poor, thus the regulation was valid in maintaining such an equitable balance, although it was not mathematically perfect. The test was whether the action of the state had a rational basis and was free from invidious discrimination. The Equal Protection Clause was said not to require a state to choose between attacking every aspect of a problem or not attacking the problem at all.

When that test is applied to the matter at hand, the Alabama statute is clearly constitutional. The state has a legitimate interest in insuring that trials be conducted before

juries which represent a true cross-section of the community. That one is entitled to be tried before a jury of his peers, or have his dispute tried before a jury of his peers, is fundamental to American jurisprudence. If the decision of the court below is upheld, simple economics will dictate avoidance of jury service and the resulting financial loss. Those who are not benefitted by the statute now, because of no employer-employee relationship, seek to avoid jury service for the same reason. If those who are so employed are denied the benefits of the statute, juries representative of the community will be a thing of the past in Alabama. For want of benefits to the former, the latter must suffer. If the problem cannot be totally corrected, then you cannot partially correct it. That is the position of the respondent. The State of Alabama has been put in the position of attacking the problem in all aspehts or not attacking it at all. That, this Court has said in *Dandridge*, supra, is not required under the Equal Protection Clause.

Alabama has another justifiable interest in seeing that economic hardship is not cast upon prospective jurors who are compelled, by law, to leave work and serve as jurors. Just as Maryland was held to have a legitimate interest in avoiding discrimination between welfare families and families of the working poor, Alabama, by the same token, has the same interest in avoiding discrimination between those called for jury service and those who are not called. The statute provides for an equitable balance between the two, and should not be rendered invalid because it places a burden upon the employer.

It should be noted at this point that the statute applied to *all* employers, without classification. That a business regulation may reduce the net income of the business is not

a constitutional infirmity. *Day-Brite Lighting v. Missouri*, supra.

The decision of the Alabama court is clearly out of harmony with the decisions of this court. Because of this conflict, and because it interprets a vital constitutional provision, it is most urgent that this court review the decision below.

There is yet another compelling reason for granting review, and that involves the apparently hopeless conflict of the lower court's decision with this court's decision in *Day-Brite Lighting v. Missouri*, supra. That case was decided in 1952, and concerned the constitutionality of a Missouri statute which made it a misdemeanor for any employer to deduct wages from an employee who absented himself from work to vote. The employee was entitled to four hours absence from work between opening and closing of polls, during which time the employer could not deduct wages, although the employer naturally received no service during that time. This court held that it was not rendered unconstitutional because the employer had to pay wages during the period of time he received no service since the fixing of the financial burden for employees voting was within the police power of the legislature to promote public welfare.

The decision below should have been decided in accordance with this case. The holding was entirely inconsistent with it. The *Day-Brite* case cannot be substantially distinguished from the case at hand. The lower court sought to distinguish it on the basis of the evils which each respective legislature sought to correct. The purpose of the Missouri statute was to prevent employer influence over voting, while the purpose of the Alabama statute was to prevent economic

hardship on jurors. We submit there is no valid distinction. If the State of Maryland has a legitimate interest in preventing economic discrimination between welfare families and families of the working poor, then the State of Alabama has a legitimate interest in preventing economic discrimination between jurors and non-jurors, and thus is in a position to so regulate and pass legislation to that end. Furthermore, as Missouri was held to have a legitimate interest in "getting out the vote," so must Alabama be held to have a legitimate interest in insuring representative juries in its courts.

In summary, to hold that employers do not have to compensate for time lost as a juror, in light of this court's holding that they must compensate for time lost while voting, presents two irreconcilable positions requiring determination or clarification by this court. The Alabama decision is out of step with the modern trend of reviewing legislative acts which this Court has established. To quote from *Day-Brite*, supra, at page 423:

> "But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided."

And, further, in holding that business, economic and social issues were best left to legislative decision, at page 424:

> "The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well being of the community is one part of it; the political well-

being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. *But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the Lochner, Coppage, and Adkins cases.*

"The classification of voters so as to free employees from the domination of employers is an attempt to deal with an evil to which the one group has been exposed. The need for that classification is a matter for legislative judgment, American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 69 S.Ct. 258, *and does not amount to a denial of equal protection under the laws."* (Emphasis added)

We submit that the court below has decided a very substantial and important constitutional issue which either 1) has not been specifically determined by this court, or 2) has been determined contrary to this court's holdings in the cases of *Day-Brite Lighting v. Missouri, Ferguson v. Skrupa,* and *Dandridge v. Williams,* supra. The decision is either in conflict with these cases, or is not in conflict and thus a matter not decided by this court. Furthermore, the court below relied upon *Coppage v. Kansas,* supra, a decision no longer recognized by this court.

The opinion of the court below has raised issues which, we respectfully submit, should be settled by this Court. The issues involved here, and the effect of the decision below, if

unreversed, upon the authority of an elected legislative body to pass laws to promote the social and economic welfare of its citizens as it sees fit, makes this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Thomas E. Davis, an attorney of the law firm of Burns, Carr & Shumaker, attorneys of record for Sam Dean, petitioner herein, depose and say that on the 26 day of March, 1973, I served a copy of the foregoing Petition for Writ of Certiorari to the Court of Civil Appeals of Alabama on respondent herein, by delivering the same to Honorable George Ford, of the law firm of Dortch, Wright & Ford, 307 Broad Street, Gadsden, Alabama, attorneys of record for the respondent herein.

Thomas E. Davis

Subscribed and sworn to before me, this —— day of March, 1973.

NOTARY PUBLIC, STATE OF ALABAMA AT LARGE

APPENDIX A

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

SPECIAL TERM, 1972

7 Div. 50

The Gadsden Times Publishing Corporation,
a corporation

v.

Sam Dean

Appeal from Etowah Circuit Court

PER CURIAM

This is an appeal from the Circuit Court of Etowah County on a two-count complaint filed by appellee. One count of the complaint is on an account in code form. Count two was brought under Tit. 30, § 7(1), Code of Alabama 1940. The matter was submitted to the trial court without a jury on an agreed statement of facts and thereafter judgment was entered for appellee (plaintiff below) in the amount of $63.90 plus costs.

The stipulated facts reveal the following: Appellee was employed by appellant during the week of November 3, 1969; that during the week of November 3, 1969, the appellee was subpoenaed for jury duty and, in fact, did serve on the jury on November 3, 4, and 5, 1969; that appellee was paid for said jury duty by the circuit clerk of Etowah County, Ala-

bama; that appellee made demand upon appellant for the payment to him of $63.90, which sum represented the difference in his jury pay and his usual compensation, pursuant to Tit. 30, § 7(1), Code of Alabama 1940; that defendant refused to pay and has continuously refused to pay the plaintiff the said sum.

Tit. 30, § 7(1), Code of Alabama 1940, reads as follows:

> "Upon receiving a summons to report for jury duty, any employee shall on the next day he is engaged in his employment exhibit the summons to his immediate superior and the employee shall thereupon be excused from his employment for the day or days required of him in serving as a juror in any court created by the constitutions of the United States or the state of Alabama or the laws of the United States or the state of Alabama. Notwithstanding the excused absence as herein provided, any full-time employee shall be entitled to his usual compensation received from such employment less the fee or compensation he received for serving as such juror. It shall be the duty of all persons paying jurors their fee or compensation for services to issue to each juror a statement showing the daily fee or compensation and the total fee or compensation received by the juror."

Appellant argues some five assignments of error which can be categorized as follows: Assignment of Error No. (1) contends that the judgment of the trial court is erroneous in that Tit. 30, § 7(1), Code of Alabama 1940, is in violation of § 1 of the fourteenth amendment to the Constitution of the United States. Assignment of Error No. (3) contends that the judgment of the trial court is erroneous in that the same code section violates art. I, § 23, of the Constitution of Ala-

bama of 1901. Assignments of Error Nos. (4) and (8) are to the effect that the complaint fails to state a cause of action under Tit. 30, § 7(1), Code of Alabama 1940. The last assignment of error argued attacks the sufficiency of the evidence to support a judgment on either count of the complaint.

Appellant, in his brief, persuasively contends that the Constitution of the United States is violated in that Tit. 30, § 7(1), Code of Alabama 1940, takes property from the appellant without due process of law, and denies appellant equal protection of the law. To this contention, appellee ites authority that the legislative act in question is a valid exercise of the state of Alabama's police power to protect the general welfare of the public.

This dispositive question presented by this appeal as we view it is whether or not an employer's constitutional rights are violated when he, the employer, is required to pay his employee, during his absence from work while performing jury duty, his usual compensation for such employment less the fee or compensation the employee receives for serving as a juror, where such employer, naturally, during the absence, receives no services from the employee.

Every presumption is in favor of the constitutionality of an act of the legislature. The Supreme Court of Alabama has said:

> "[T]his court will not declare it invalid unless, in its judgment, the act clearly and unmistakably comes within the inhibition of the constitution. . . ." *Mobile Housing Bd. v. Cross*, 285 Ala. 94, 97, 229 So. 2d 485, 487.

The Supreme Court further stated, in *Brittain v. Weatherly*, 281 Ala. 683, 685, 207 So. 2d 667, 668:

> "It is the duty of courts to sustain the constitutionality of a legislative act unless it is clear beyond a reasonable doubt that it is in violation of the fundamental law. . . ."

In passing upon the constitutionality of a legislative act the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than to strike down the enactment of a coordinate branch of the government. *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 18 So. 2d 810.

Courts do not hold statutes invalid because they think there are elements therein which are violative of natural justice or in conflict with the courts' notion of natural, social, or political rights of the citizen, or even if the courts think the act harsh or in some degree unfair, and presents chances for abuse, or is of doubtful propriety. All of these questions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative bodies and are matters with which the courts have no concern. The only question for the court to decide is one of power, not of expediency or wisdom. *Alabama State Federation of Labor v. McAdory, supra; City of Ensley v. Simpson*, 166 Ala. 366, 52 So. 61; *State v. Alabama Fuel & Iron Co.*, 188 Ala. 487, 66 So. 169.

The above stated principles are, of course, strongly adhered to by this court; however, where the protection of the Federal Constitution is sought to overthrow legislation the courts must determine whether such legislation is a fair, reasonable and appropriate exercise of the state's power. *Lash v. State*, 244 Ala. 48, 14 So. 2d 229.

The Supreme Court of the United States has said that police power has no exact definition. *Berman v. Parker*, 348

U.S. 26, 99 L. Ed. 27, 75 S.Ct. 98. The Supreme Court of Alabama, in *Wolf v. Smith*, 149 Ala. 457, 463, 42 So. 824, 826, said:

> "We shall not attempt a definition of the police power, that may be learned, if desired, in the text-writers and from the adjudged cases, albeit it has been said that a definition has rarely been attempted by the courts, and the attempt has never been attended with complete success. . . ."

It can be said that the police power of the state may be employed to protect the health, safety, morals, and general welfare of the community. In *Allinder v. City of Homewood*, 254 Ala. 525, 531, 49 So. 2d 108, 112, Mr. Justice Foster said:

> "Such power is not limited to protection of public health, but extends to matters of public convenience and matters pertaining to public wellbeing or welfare. . . ."

Neither appellant nor appellee, in their excellent briefs, point out to the court any state which has enacted a statute similar to the one in question. The court's research reveals only one such similar statute, which was enacted by the legislature of the state of Hawaii and is cited as H. R. S., § 388-32. The Hawaii act requires that every employer who employs more than twenty-five persons shall pay to each of his employees who serves on the jury or public board compensation in an amount equal to the difference between the remuneration which the employee receives for such service on a jury or public board and any other remuneration he would have received from his employer had he not served on the jury or public board.

The constitutionality of that statute was tested in *Hasegawa v. Maui Pineapple Company*, 475 P. 2d 679. The Supreme Court of Hawaii held that this act of the legislature was not a valid exercise of the state's police power but was a class distinction in violation of the equal protection clauses of both the Hawaii and Federal Constitutions. The Hawaii Supreme Court, in the *Hasegawa* case, *supra*, cites and attempts to distinguish the case of *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 96 L. Ed. 469, 72 S.Ct. 405 (1952).

Appellee, in his brief, cites to us *Day-Brite, supra*. The Hawaii Supreme Court determined that the rationale of the Supreme Court of the United States in *Day-Brite Lighting*, in holding that a Missouri legislative act which made it a misdemeanor for any employer to deduct wages from an employee who absented himself from his place of employment to vote was a valid exercise of the police power of the state of Missouri, was based upon the fact that the evil attempted to be corrected was that employers might use their power over employees' wages to coerce them in voting. *The Supreme Court of Hawaii, in Hasegawa, supra, determined the purpose of their statute, H. R. S., § 388-32, was not to prevent employer coercion of employees in the exercise of their franchise, but rather was to insure that those rendering services to the state receive adequate compensation. This, we also determined, is the purpose of the Alabama statute. The issue is the reasonableness of a legislative decision as to who should be called upon to pay this compensation.*

The fourteenth amendment to the Constitution of the United States does not interfere with a proper exercise of the police power of a state, but the power must be so exercised as not to invade unreasonably the right guaranteed by the Federal Constitution.

The fourteenth amendment provides no state shall deprive a person of his life, liberty, or property without due process of law or deny to any person within its jurisdiction the equal protection of the law.

The Supreme Court of the United States, in *Coppage v. Kansas*, 236 U. S. 1, 59 L. Ed. 441, 34 S. Ct. 240, said that if in a statute there is no object or purpose, express or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his financial independence, an unconstitutional interference with the normal exercise of personal liberty and property rights is the primary object of the statute. It is not an incident to the advancement of the general welfare and is barred by the fourteenth amendment.

Here, the only apparent intent of the legislative act is that an employee shall not suffer economic loss while serving as a juror. Jurors are, while it may be a meager sum, paid by the state. Tit. 11, §§ 14 and 98, Code of Alabama 1940. These code sections clearly show that the state legislature, by enacting the above and various local acts, have determined what the amount of jury pay should be and where it is to be derived, to wit, the county treasury. *The statute at bar would require employers to, in effect, supplement this pay while requiring others to make no contribution.*

Service as a juror is, in effect, part-time public employment; however, in increasing jury pay the legislature did not assess the general public by apportioned taxation. *Instead, the legislature made a class distinction and placed the cost of increased jury pay for some of our citizens solely*

on private employers. There is no specific benefit to employers that would justify this class distinction. *Absent such a benefit there is no basis for singling out this one group from the general populace in seeking to achieve the legislative purpose. Hasegawa v. Maui Pineapple Co., supra.*

The Supreme Court of Alabama has said that the legislature is not prohibited from making reasonable classification in the operation of our laws; but such a classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any such substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Birmingham-Tuscaloosa Ry & Utilities Co. v. Carpenter,* 194 Ala. 141, 69 So. 626.

In exercising the right to classify in order to achieve social goals, the legislature may not act arbitrarily; that is, *the classification of a particular group as a subject for the regulation must be reasonable in relation to the purpose of the legislature.* The United States Supreme Court, in *Allied Stores of Ohio v. Bowers,* 358 U. S. 522, 3 L. Ed. 2d 480, 79 S. Ct. 437, stated:

> "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that *the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . .'* " (358 U. S. at 527, 79 S. Ct. at 441)

Tit. 30, § 7(1), Code of Alabama 1940, attempts to shift to private employers some of the expense of running the public function of the courts, and this court cannot escape the conclusion that such action is a taking of private property which would require just compensation. The "taking", as we view it, cannot be justified under the state power to tax, because the act is not a general tax measure, and the group who bears the burden, the employer, receives no special benefit.

The goal of our legislature, in seeking to insure that certain citizens do not suffer economic loss while performing jury duty, is a laudible goal, but in this instance it is attempted to be accomplished by unconstitutional means.

It should be noted that the act in question applies to all employers; the corporate employer, the small businessman, the corner service station, the housewife who is fortunate enough to employ full-time domestic help, and to require these persons to supplement jury pay while exempting others from bearing their proportionate share of this essential function is, to this court, unconstitutional.

There is no question but that it is the right of every union, negotiating with an employer, to bargain for no loss of pay while its members are serving as jurors. It is also the right of an individual employee to make the matter in question a condition of his employment, but we do not believe the constitution allows the state to require the same of an employer.

This court is mindful that neither the legislature nor the learned trial judge had any court decision in this state or any state, or any state statute, other than that which we

have noted, from which to draw experience or guidance.

We must therefore hold that Tit. 30, § 7(1), Code of Alabama 1940, not being justified under either the police power or power to tax, is in violation of the fourteenth amendment to the United States Constitution.

Appellant timely filed a reply brief to appellee's brief. Thereafter, appellee timely filed a motion to strike appellant's reply brief, assigning eight grounds. This court is of the opinion that some of appellee's grounds are well taken and for this reason the appellant's reply brief was not considered by this court.

Having concluded that Tit. 30, § 7(1), Code of Alabama 1940, is violative of the United States Constitution, other assignments argued by appellant need not be considered. The case, therefore is reversed.

REVERSED.

All judges concurring.

APPENDIX B

IN RE THE GADSDEN TIMES PUBLISHING CORP., a corp.

v.

SAM DEAN

EX PARTE SAM DEAN

SC 132.

Supreme Court of Alabama.

Oct. 19, 1972.

Rehearing Denied Nov. 30, 1972.

Certiorari to the Court of Civil Appeals.

Thomas E. Davis, Burns, Carr & Shumaker, Gadsden, for petitioner.

No brief for respondent.

COLEMAN, Justice.

Petition of Sam Dean for Certiorari to the Court of Civil Appeals to review and revise the judgment and decision of that Court in Gadsden Times Publishing Corp v. Dean, 19 Ala.App. 45, 268 So.2d 829.

Writ denied.

HEFLIN, C. J., and HARWOOD, BLOODWORTH and McCALL, JJ., concur.